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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
12

13 HEATHER JOHNSTON and DAVID
14 F. DICKINS,

15 Plaintiffs,

16 v.

17 IRONTOWN HOUSING
18 COMPANY, INC., a reputed Utah
19 corporation aka "IRONTOWN
20 HOUSING CORPORATION, INC.,
a Utah Corporation" et al.,

21 Defendants.
22

CASE NO. 13-CV-0523 W (BLM)

ORDER DENYING:

(1) DEFENDANTS' MOTION TO
DISMISS [DOC. 4]; (2) PLAINTIFFS'
MOTION FOR JUDGMENT ON
THE PLEADINGS [DOC. 5]; AND
(3) PLAINTIFFS' EX PARTE
APPLICATION [DOC. 18]

23 Defendants Irontown Housing Company, Inc. ("IHC"), Richard P. Valgardson,
24 and Kam Valgardson move to dismiss for improper venue, failure to sufficiently plead
25 fraud, dismissal based on a California State License Board action, failure to state a claim,
26 and failure to plead alter ego. Plaintiffs Heather Johnston and David F. Dickins move
27 for judgment on the pleading, and have filed an ex parte application for leave to file
28 supplemental evidence in opposition to Defendants' motion.

1 The Court decides the matters on the papers submitted without oral argument
2 pursuant to Civil Local Rule 7.1(d.1). For the reasons discussed below, the Court
3 **DENIES** Defendants' motion to dismiss [Doc. 4], Plaintiffs' motion for judgment on the
4 pleadings [Doc. 5], and Plaintiffs' ex parte application [Doc. 18].

5
6 **I. BACKGROUND**

7 Defendant IHC is a Utah corporation or other form of business entity which
8 manufactures modular housing in Utah and does substantial business in California.
9 (*Compl.*¹, ¶ 2; *MTD* [Doc. 4-1], 3:10-25.) IHC is qualified to act through subcontractors
10 to carry out final installation and follow-up work in California. (*MTD*, 3:26-27.)

11 Plaintiffs are California residents, who purchased a residential lot in La Jolla,
12 California, with plans to build a custom-designed modular home. (*Id.*, ¶¶ 1, 10.) On
13 April 12, 2012, Plaintiffs entered into a written Sales and Purchase Contract (the
14 "Contract") with Defendants for the purchase of a modular home. (*Id.*, ¶ 15.) Under
15 the Contract, Defendants are responsible for "build[ing] the Structure" according to
16 specification, "arrang[ing] the delivery of the Structure modules to the Site,"
17 "weatherproofing and protecting the Structure modules on-Site, setting the modules on
18 the foundation, stitching the modules together and [performing] on-site construction, as
19 set forth in the Contract Documents." (*Contract*², 30.) Defendants are also responsible
20 for "trenching and installation of pipe, conduit and wiring unless said wiring, pipe or
21 conduit must be installed by Utility Company." (*Id.*)

22 The Contract also includes a forum-selection clause mandating that Plaintiffs shall
23 bring suit against Defendants in Utah "with respect to the work performed in the
24 Factory," and only in California "with respect to the work performed onsite, including
25 but not limited to the foundation, plumbing, utility work, concrete or site work as
26 described in the contract documents." (*Contract*, 33.)

27 ¹ The Complaint is attached as Exhibit 1 to the Notice of Removal [Doc. 1].
28

² The Contract is attached as Exhibit 2 to the Notice of Removal.

1 Once Defendants' manufacture of the modules was completed, inspected, and
2 approved, the modules were delivered to Plaintiffs' lot for assembly and installation.
3 (*Compl.*, ¶ 19.) Plaintiffs contend that on or about September 2012, they noticed a
4 problem with the roof installation and notified Defendants. (*Id.*, ¶ 21.) Subsequently,
5 Defendants and their subcontractors made "multiple botched repair attempts" to the
6 roof. (*Id.*, ¶ 22.) Plaintiffs also allege that, upon removing and replacing the roof, they
7 discovered additional defects and discrepancies with the manufacture and assembly of
8 the modules and that Defendants had failed to make "critical repairs" to the electrical
9 system that they claimed to have made. (*Id.*, ¶ 24.) Moreover, Plaintiffs allege that
10 incorrect hangar hardware was used, doors and windows were out of plumb, electrical
11 fire hazards resulted from improper wiring, a major support beam was installed upside
12 down, and HVAC vents and ducts were damaged. (*Id.*, ¶ 26.)

13 On or about October 11, 2012, Plaintiffs requested a Certified License History
14 from the California Contractors State License Board ("CSLB") for IHC, using the license
15 number Defendants provided in the Contract. (*Compl.*, ¶ 17; *CSLB Cert.*³, 56.) The
16 CSLB responded that their search did not produce any record that IHC was licensed as
17 a California contractor during the period of January 1, 2011 to October 17, 2012. (*Id.*)

18 In response to these events, Plaintiffs "sent an unfiled version of the Complaint
19 to Defendants on December 18, 2012, giving them until December 27, 2012, to come
20 to the table." (*Opp'n* [Doc. 6-1], 8:18-20.) Plaintiffs also ceased making payments on the
21 modular home. (*MTD*, 5:10-11.) On December 27, 2012, Defendants filed their own
22 complaint in the Fourth Judicial District Court in Utah County based on breach of
23 contract and other claims. (*Id.*, 5:12-17.)

24 On or about January 8, 2013, Plaintiffs filed a lawsuit in the San Diego Superior
25 Court alleging causes of action for recovery of compensation paid to an unlicensed
26 contractor under California Business and Professions Code § 7031(b), breach of
27 contract, fraud, negligent misrepresentation, unfair trade practices, and unjust

28 ³ The CSLB Certification of Records is attached as Exhibit 2 to the Notice of Removal.

1 enrichment. (*Compl.*, ¶¶ 27-54.) Defendants then removed the action to this Court on
2 March 6, 2013, pursuant to 28 U.S.C. § 1441(b). (*Notice of Removal*, 1-5.) Defendants
3 then moved to dismiss and Plaintiffs filed the motion for judgment on the pleadings.
4

5 **II. MOTION FOR JUDGMENT ON THE PLEADINGS**

6 Plaintiffs move for judgment on the pleadings under Federal Rule of Civil
7 Procedure 12(c). Defendants argue that the motion is premature because the pleadings
8 are not closed. The Court agrees.

9 In Doe v. U.S., 419 F.3d 1058 (9th Cir. 2005), defendant moved to dismiss and
10 plaintiff filed a cross-motion for judgment on the pleadings under Rule 12(c). The Ninth
11 Circuit held that plaintiff's motion was premature because defendant had not yet filed
12 an answer. Id. at 1061. Citing Rule 7(a) and Rule 12(c)'s language that such motions
13 may be filed "[a]fter the pleadings are closed—but early enough not to delay trial[,]" the
14 Ninth Circuit explained that "pleadings are closed for purposes of Rule 12(c) once a
15 complaint and answer have been filed" Id.

16 Plaintiffs recognize that their motion is premature under Doe, but argue that "this
17 case is a worthy exception to the rule" because they can prove no material issue of fact
18 remains as to the first cause of action. (*Pl's Reply* [Doc. 10], 2:5-22.) The Court
19 recognizes that other district courts have allowed a motion for judgment on the pleadings
20 to proceed despite the fact that some defendants have not filed an answer. However, in
21 those cases, the defendant against whom the motion was filed had filed an answer and,
22 therefore, the pleadings were closed as to that defendant. See Johnson v. Dodson Pub.
23 Sch., 463 F.Supp.2d 1151, 1156 (D.Mont. 2006) (motion allowed where relevant cause
24 of action was only asserted against the defendant who had filed an answer); Noel v. Hall,
25 2005 WL 2007876 at *1-2 (D.Or. 2005) (motion allowed where two other defendants
26 had not answered the complaint for five years); Moran v. Peralta Cmty. Coll. Dist., 825
27 F.Supp. 891, 894 (N.D. Cal. 1993) (motion allowed where another defendant had not
28 been served with the complaint and thus was not yet a party).

1 In contrast to those district court cases, Plaintiffs motion in this case seeks
2 judgment on the pleadings against Defendants who have not yet filed an answer. Under
3 these circumstances, the Court finds an exception to Rule 12(c) is not warranted.
4 Accordingly, the Court finds Plaintiffs' motion is premature.

5
6 **III. MOTION TO DISMISS**

7 Defendants base their motion to dismiss Plaintiffs' complaint on five grounds:
8 improper venue based on a forum-selection clause; the *Colorado River*⁴ abstention
9 doctrine; failure to plead fraud with particularity under Rule 9(b); failure to state a claim
10 for negligent misrepresentation under Rule 12(b)(6); and failure to plead the alter-ego
11 theory. For the foregoing reasons, the Court finds the arguments unpersuasive.

12
13 **A. California is the proper forum for claims arising from work performed**
14 **in California.**

15 The enforceability of a forum-selection clause is determined by federal law.
16 American Home Assurance Co. v. TGL Container Lines, Ltd., 347 F. Supp. 2d 749, 755
17 (N.D. Cal. 2004). Forum-selection clauses are prima facie valid and should not be set
18 aside unless it can be shown that such a provision is unreasonable under the
19 circumstances. Argueta v. Banco Mexicano S.A., 87 F.3d 320, 325 (9th Cir. 1996).
20 "The party resisting enforcement of the clause has a heavy burden" to prove
21 unreasonableness. Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F. 2d
22 273, 281 (9th Cir. 1984) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18
23 (1972)). If the party does not meet this burden, "the provision should be respected as
24 the expressed intent of the parties." Id. at 280.

25 Here, Defendants do not contend that the clause is unreasonable, but rather argue
26 that the clause should be enforced. (MTD, 9:1-3.) Similarly, Plaintiffs do not dispute the
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⁴ See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

1 reasonableness of the provision and also argue for its enforcement.⁵ (*Opp'n*, 3:4-12.)
2 Therefore, there is no dispute that the provision should be enforced as the expressed
3 intent of the parties.

4 The language of the forum-selection clause provides:

5 In the event that either party seeks to enforce this Contract through resort
6 to the legal process, the defaulting party agrees to pay the costs of such
7 enforcement, including reasonable attorney's fees. This contract shall be
8 deemed to have been made, and to be performed in the State of Utah,
9 County of Utah and subject to Utah law with respect to the work
10 performed in the Factory. This contract shall be deemed to have been
11 made, and to be performed in, the State of California, County of San
12 Diego, and subject to California law with respect to the work performed
13 onsite, including but not limited to the foundation, plumbing, utility work,
14 concrete or site work as described in the contract documents. In the event
15 of any litigation with respect to this Contract, jurisdiction and venue shall
16 be proper only in the applicable County as described above.

17 (*Contract*, Ex. 2 at 7-8.)

18 Both parties interpret this provision as requiring that litigation relating to work
19 performed in Utah must be filed in Utah, while litigation arising from work performed
20 in California must proceed in California. (*MTD*, 8:27-9:3; *Opp'n*, 3:8-12.) The parties'
21 central dispute, therefore, appears to be whether the claims in this lawsuit arise from
22 work performed in Utah or California.

23 Contrary to both parties' contention, the Complaint alleges problems with work
24 performed in both states. The Complaint pleads facts regarding the manufacture of the
25 modules in Utah, as well as their installation and other onsite work performed in
26 California. For example, Plaintiffs allege that after removing the roof they contend was
27 improperly *installed*, "they discovered additional defects and discrepancies with the
28 *manufacture and assembly* of the modules that were previously concealed." (*Compl.* ¶¶ 22,
29 24, emphasis added.)

30 ⁵ Plaintiffs argue, in the alternative, that if the forum-selection clause mandates litigation
31 in Utah, the clause may be unenforceable based on Defendants' lack of proper licensing. The
32 Court need not resolve this issue given its finding that California is a proper forum.

1 With respect to the installation of the roof, the Complaint alleges that the work
2 occurred in California: “Once IHC’s manufacture of the modules was completed,
3 inspected, and approved, IHC had the modules delivered to plaintiffs’ Lot for assembly
4 and installation.” (Compl. ¶ 19.) While Defendants argue that the “roof was in fact
5 installed in Utah,” Defendants provide no evidence to support this statement. (See MTD
6 8:16–19.) The Court, therefore, will assume the truth of Plaintiffs’ factual allegation that
7 the roof was installed in California. Accordingly, California is the proper forum for
8 claims relating to the roof’s installation, as well as other work that Plaintiffs establish was
9 performed in California.

10 Despite the Court’s finding that California is a proper forum, the forum-selection
11 clause nevertheless requires Plaintiffs to pursue claims related to work performed in Utah
12 in that forum. Thus, to the extent Plaintiffs are seeking damages arising from defects and
13 discrepancies that occurred during the manufacture and assembly of modules in Utah,
14 Plaintiffs may not pursue those claims here, absent a waiver by Defendants.

15
16 **B. Colorado River abstention is not appropriate in this case.**

17 Defendants next argue that the Court should dismiss the case in its discretion
18 under the *Colorado River* abstention doctrine due to the CSLB and Utah actions. (MTD,
19 9:7, 10:6-27, 11:1-22.) The doctrine allows a district court to stay or dismiss a case
20 because of a duplicative state proceeding, provided that exceptional circumstances exist.
21 Colo. River, 424 U.S. at 818. Courts, however, are reluctant to abstain under the
22 *Colorado River* Abstention Doctrine. See Intel Corp. v. Advanced Micro Devices, Inc.,
23 12 F.3d 908, 912 (9th Cir. 1993). For several reasons, the Court finds abstention is not
24 warranted here.

25 First, Defendants contend that the case should be dismissed based on the CSLB
26 action. Defendants quote a portion of the Colorado River opinion for the proposition
27 that if this Court exercises jurisdiction, it would disrupt “state efforts to establish a
28 coherent policy with respect to a matter of substantial policy concern.” (MTD, 9:14-18.)

1 However, Defendants fail to identify the policy that would be affected by adjudication
2 of this case, nor is the Court aware of any such policy. Therefore, Defendants' first
3 argument lacks merit.

4 Defendants next contend that the Utah action concerns the same nucleus of
5 operative facts and, therefore, warrants dismissal of this case. (MTD, 10:6-27, 11:1-2.)
6 To support this contention, Defendants rely on the Colorado River Court's
7 consideration of "wise judicial administration" and "regard [for] conservation of judicial
8 resources and comprehensive disposition of litigation." (*Id.*, 10:10-13.) Defendants then
9 argue that because the Utah Action was filed first, this case should be dismissed to avoid
10 piecemeal litigation.

11 But the argument ignores the fact that piecemeal litigation is the direct result of
12 the parties' freely negotiated forum-selection clause, which designates two different
13 forums, depending on the type of work at issue. If the parties intended to avoid this
14 result, the Court assumes they would have drafted the clause to designate the forum
15 where litigation was first filed as the proper place to resolve litigation over work
16 performed in both states. The clause, however, does not so provide. Given the "strong
17 policy favoring enforcement of a freely negotiated forum selection clause[.]" (see Argueta,
18 87 F.3d at 324), the Court is not persuaded by Defendants' concern with piecemeal
19 litigation.

20 Moreover, in evaluating whether to dismiss an action, Colorado River also
21 considers "the inconvenience of the federal forum." Colo. River, 424 U.S. at 818.
22 Given that this case involves work performed in California, this forum is convenient for
23 any California witnesses and Plaintiffs, who are California consumers and residents.

24 Lastly, after Colorado River, the Supreme Court laid out another factor for
25 consideration: whether state court proceedings offer adequate protection of the parties'
26 rights. See Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S.
27 1 (1983). Plaintiffs allege that California and Utah law differ in an applicable way.
28 Specifically, Utah law does not provide the remedy of disgorgement for unlicensed work,

1 while California does. (*Opp'n*, 5:22-24, 6:2-4.) To the extent Utah law would not
2 adequately protect Plaintiffs' rights, this factor also weights against abstention.

3 For the foregoing reasons, the Court finds that the *Colorado River* Abstention
4 Doctrine does not warrant dismissal of this action.

5
6 **C. The fraud and negligent misrepresentation claims are adequately pled.**

7 Defendants contend that Plaintiffs do not plead their third cause of action for
8 fraud with particularity as required by Federal Rule of Civil Procedure 9(b) because they
9 have not pled scienter or a causal relationship between the alleged fraud and their
10 damages. The Court disagrees.

11 Under California law, the elements of fraud are "(a) misrepresentation (false
12 representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter');
13 (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting
14 damage." Small v. Fritz Companies, Inc., 30 Cal. 4th 167, 173 (2003). In pleading
15 fraud, Rule 9(b) requires plaintiffs "state with particularity the circumstances constituting
16 fraud or mistake." Fed. R. Civ. P. 9(b). A plaintiff must specifically identify the allegedly
17 fraudulent statements or acts of fraud and plead evidentiary facts including the dates,
18 times, places and person associated with each misrepresentation or act of fraud. See
19 Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). One of the central purposes of the
20 particularity requirement is to "ensure[] that allegations of fraud are specific enough to
21 give defendants notice of the particular misconduct ... so that they can defend against the
22 charge and not just deny that they have done anything wrong." Semegen v. Weidner,
23 780 F.2d 727, 731 (9th Cir. 1985) (internal citations omitted).

24 Here, Plaintiffs contend that Defendants misrepresented that they "possessed the
25 resources and the capability to make and lawfully install plaintiffs' custom designed
26 housing modules on the Lot in California." (*Compl.* ¶¶ 11, 12, 14.) They also allege that
27 Defendants represented that IHC held a general contractor's license numbered 949449
28 when, in fact, that license is assigned to Richard Paul Valgardson. (*Id.* ¶ 17.) These

1 alleged misrepresentations were contained in advertisements and in the contracts
2 Defendants presented to Plaintiffs in April 2012. (*Id.* ¶ 12, 17.)

3 The Complaint further alleges that Defendants' misrepresentations concerning
4 their ability "to make and lawfully install plaintiffs' custom designed housing modules
5 on the Lot in California" caused them to enter into contracts with Defendants for the
6 purchase and installation of their home. (*Compl.*, ¶¶ 14, 15.) Plaintiffs further contend
7 that they would not have done so had they known the true facts, and "[a]s a direct and
8 proximate result of Defendants' fraud and deceit, Plaintiffs have suffered damages in the
9 amount not less than \$460,979.00." (*Id.* ¶¶ 36, 39, 40.) Based on these allegations, the
10 Court finds the Complaint "give[s] defendants notice of the particular misconduct ... so
11 that they can defend against the charge." Semegen, 780 F.2d at 731. Accordingly, the
12 fraud claim is sufficiently pled.

13 Defendants also argue that Plaintiffs have failed to plead the element of justifiable
14 reliance under negligent misrepresentation. However, the Court finds this argument
15 unpersuasive because, as discussed above, Plaintiffs have sufficiently pled a causal
16 relationship between the alleged misrepresentations and their damages.

17 For the foregoing reasons, the Court finds that Plaintiffs have sufficiently pled
18 claims for fraud and negligent misrepresentation.

19
20 **D. Alter-ego liability is sufficiently pled.**

21 Defendants argue that Plaintiffs do not sufficiently plead the alter-ego theory. The
22 Court disagrees.

23 The "corporate veil will be pierced" where "(1) . . . there [is] such unity of interest
24 and ownership that the separate personalities of the corporation and the individual no
25 longer exist and (2) . . . if the acts are treated as those of the corporation alone, an
26 inequitable result will follow." Mesler v. Bragg Management Co., 702 P. 2d 601, 606
27 (Cal. 1985) (citing Automotriz etc. de California v. Resnick, 306 P. 2d 1 (Cal. 1957)).
28

1 Here, Plaintiffs plead the necessary elements for alter-ego liability:

2
3 [IHC] is wholly and exclusively controlled by R. Valgardson and/or K. Valgardson,
4 that its funds are co-mingled with R. Valgardson and/or K. Valgardson's personal
5 funds, that the debts of IHC are paid by R. Valgardson and/or K. Valgardson,
6 and/or that IHC is an instrumentality used by R. Valgardson and/or K.
7 Valgardson to illegally disclaim liability for their debts. There is a unity of interest
8 between and among R. Valgardson, K. Valgardson, and IHC, and IHC is the alter
9 ego of R. Valgardson and/or K. Valgardson. Equity demands that the corporate
10 entity IHC be ignored and that R. Valgardson and K. Valgardson be held
11 personally liable for the breaches by IHC below alleged.
12 (Compl., ¶ 5.)

13 Defendants nevertheless argue that Plaintiffs claims are insufficient under
14 Twombly, and cite McClaran v. Plastic Industry, 97 F.3d 347 (9th Cir. 1995), as support
15 for this argument. But McClaran involved the dismissal of an alter-ego claim at the
16 "close of presentation of [plaintiff's] evidence" because the "court found that [plaintiff]
17 failed to prove by the requisite clear and convincing evidence" Id. at 358. In short,
18 McClaran did not involve a motion to dismiss, and thus does not support Defendants'
19 argument.

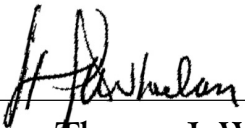
20 Because the Complaint sets forth the elements for alter-ego liability, the Court
21 finds Plaintiffs have sufficiently pled the theory.

22
23 **IV. CONCLUSION AND ORDER**

24 In light of the foregoing, the Court **DENIES** Defendants' motion to dismiss
25 [Doc. 4], Plaintiffs' motion for judgment on the pleadings [Doc. 5], and Plaintiffs' ex
26 parte application [Doc. 18].

27 **IT IS SO ORDERED.**

28 DATE: July 17, 2013



Hon. Thomas J. Whelan
United States District Judge